[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,879. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 182. Pinellas Ice and Cold Storage Company, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed June 27, 1932. File No. 36,879.

FILE COPY

FILED
JUN 27 1932
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931

No. 182

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ~~SEVENTH~~ FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ALBERT L. HOPKINS,
JAY C. HALLS,
PETER L. WENTZ,
1 No. La Salle Street,
Chicago, Illinois,
Attorneys for Petitioner.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

CHICAGO LAW PRINTING CO., 101 S. WELLS ST. FRANKLIN 0521

INDEX.

PAGE

PETITION 1

Question Presented 2
Statement of Facts 3
Errors Relied Upon 4
Reasons for Granting the Writ 5

BRIEF IN SUPPORT OF THE PETITION 9

Opinions Below 9
Jurisdiction 9
Question Involved 9
Statute Involved 10
Argument 12

CONCLUSION 27

APPENDIX 29

CITATIONS.

CASES:

Commonwealth Commercial State Bank v. Lucas, 41 Fed. (2d) Ill. 26

Cullinan, Appeal of J. S., 5 B. T. A. 996 25

First National Bank v. United States, 283 U. S. 142 23

Foster v. Commissioner, 19 B. T. A. 958 25

Green v. Commissioner, 24 B. T. A. 719 21

Komada v. United States, 215 U. S. 392 26

Meyer, Appeal of Anton M., 3 B. T. A. 1329 25

National Pipe & Foundry Co. v. Commissioner, 19 B. T. A. 242 ..... 21, 26

PAGE

Old Colony Trust Co. v. Commissioner, 279 U. S. 716 9

Parris v. Commissioner, 20 B. T. A. 320 25

Rodenbaugh, Appeal of, 1 B. T. A. 477, 25 Fed. (2d) 13 25

Rusk v. Commissioner, 20 B. T. A. 138 25

Somers Lumber Co., Appeal of, 2 B. T. A. 106..... 25

Tulas Oxygen Co. v. Commissioner, 18 B. T. A. 1283 21

U. S. v. Cerecedo Hermanos y Compania, 209 U. S. 337 26

Williams v. Commissioner, 44 Fed. (2d) 467....6, 13, 22

STATUTES AND REGULATIONS:

Sec. 240(a) Judicial Code 9

Sec. 203 of the Revenue Act of 1926 .....10, 29

Art. 1574, Regulations 65 .....5, 7, 17, 24

Art. 1574, Regulations 69 .....5, 7, 18, 24

BUREAU OF INTERNAL REVENUE RULINGS AND MISCELLANEOUS:

G. C. M. 1753, V-1 C. B., p. 138 21

G. C. M. 2000, VI-2 C. B., p. 248 23

G. C. M. 3291, VII-1 C. B., p. 203 23

G. C. M. 3827, VII-2 C. B., p. 114 .....6, 19

G. C. M. 7472, IX-1 C. B., p. 184 .....6, 19, 20

G. C. M. 8565, IX-2 C. B., p. 127.....6, 19, 20

I. T. 2542, IX-2 C. B., p. 126 .....6, 19, 20

PAGE

Report of the Ways and Means Committee on the Revenue Act of 1924 (Report No. 179, 68th Congress) 7, 16, 24

Report of the Finance Committee of the Senate (Report No. 398, 68th Congress) 7, 17, 24

Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor, dated March 6, 1924 ..... 7, 15, 24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No.

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari.

Pinellas Ice and Cold Storage Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on March 29, 1932 (R. 46), reported in 57 Fed. (2d) 188.

This case reached the Circuit Court of Appeals on the petition of Pinellas Ice and Cold Storage Company for a

review of the decision of the United States Board of Tax Appeals in determining a deficiency in income taxes for the year 1926.

Question Presented.

Section 203 of the Revenue Act of 1926 provides that no gain or loss shall be recognized, so far as the corporation is concerned, when a corporation, a party to a reorganization, exchanges property for securities and cash received from another corporation, a party to the reorganization, and these are distributed in pursuance of the plan of reorganization to the stockholders.

A newly formed corporation acquired over 99 per cent of the assets of Petitioner (R. 30) and, likewise, substantially all the assets of another corporation known as Citizens Ice & Cold Storage Company (hereinafter called "Citizens Company"). The acquisition of these two properties was in pursuance of a plan, worked out over a period of months, and two agreements, the carrying out of each of which was dependent upon the carrying out of the other. In other words, the new corporation acquired substantially all of the assets of two existing corporations, pursuant to a definite and mutually agreed plan.

The Revenue Act of 1926 provides:

> "203 (h) (1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corpora-

tion of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected."

The Circuit Court of Appeals held that the acquisition of substantially all of the properties of another corporation did not constitute a reorganization within the meaning of the above statute.

That is the question presented to this Court.

Statement of Facts.

As a result of negotiations which took place during the greater part of 1926, it was agreed that Petitioner and Citizens Company, two corporations, most of whose stock was owned by the same persons, would transfer all of their operating properties, being substantially all of their assets, to a new corporation to be formed, for a consideration, in Petitioner's case, of $400,000 in cash and $1,000,000 in promissory notes of the new corporation secured by bonds, in turn, secured by a mortgage on the properties, and in the case of the Citizens Company, a similar consideration. It was definitely agreed by the directors and stockholders of Petitioner and Citizens Company, prior to the consummation of the agreement, that the two corporations would cease business, be dissolved, and the assets forthwith distributed to the stockholders.

On November 4, 1926, separate contracts were made by Petitioner and Citizens Company, each with the National

Public Service Company, setting out the terms of the agreement with reference to the transfer of the assets. In the contracts the word "sale" was used. The performance of each of these contracts was dependent upon the performance of the other.

In December, 1926, pursuant to the agreements, National Public Service Corporation caused a new corporation to be formed, known as the Florida West Coast Ice Company, which corporation carried out the agreements and at the time of the conveyance of the properties, delivered cash and promissory notes, secured by mortgage bonds as agreed. A large part of the cash paid for Petitioner's property was paid either directly to creditors of Petitioner or through Petitioner, to creditors. The remaining proceeds of the transfer, after deduction for expenses, was distributed to the stockholders by trustees in liquidation of Petitioner and Citizens Company. (R. 22-30.)

The Commissioner of Internal Revenue determined that there was a taxable profit to Petitioner in the sum of $552,144.12 and a tax thereon in the sum of $74,673.50, which action has been sustained by the Circuit Court of Appeals for the Fifth Circuit. Petitioner contends that in accordance with the above statute the corporation is not subject to tax. There is a single tax to the stockholders and not a double tax, one to the corporation and one to the stockholders.

Errors Relied Upon.

(1) The Circuit Court of Appeals erred in failing to find that the acquisition of substantially all the assets

of petitioner by another corporation constituted a reorganization under Section 203 of the Revenue Act of 1926.

(2) The Circuit Court of Appeals erred in not finding that the acquisition of substantially all of the petitioner's assets by another corporation in exchange for cash and securities and the distribution of the proceeds thereof was a transaction upon which gain was not recognizable to Petitioner pursuant to Section 203 of the Revenue Act of 1926.

(3) The Circuit Court of Appeals erred in failing to find that the Board of Tax Appeals erred in including in Petitioner's taxable income for the year 1926 the amount of $552,144.12 as profit on the transfer of its assets to the Florida West Coast Ice Company.

Reasons for Granting the Writ.

The Circuit Court of Appeals has held that the acquisition of substantially all of the assets of one corporation by another corporation does not constitute a reorganization within the meaning of that part of the Revenue Act of 1926 above quoted.

In so construing the statute, the Court has adopted a construction which is

(1) plainly contrary to the explicit language of the statute,

(2) contrary to the construction by the Treasury Department of the same language in the Revenue Act of 1924 and the Revenue Act of 1926. Art. 1574, Regulations 65; Art. 1574, Regulations 69; G. C.

M. 3827, VII-2 C. B. p. 114; G. C. M. 7472, IX-1 C. B. p. 184; I. T. 2542, IX-2 C. B. p. 126; G. C. M. 8565, IX-2 C. B. p. 127.

(3) contrary to the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Williams* v. *Commissioner,* 44 Fed. (2) 467.

The question as to whether or not the acquisition of substantially all of the property of another corporation constitutes a reorganization within the meaning of the statute is of tremendous importance to the Government and to thousands of taxpayers. Since the enactment of the Revenue Act of 1924, there have been literally thousands of reorganizations of corporate structures. Questions as to whether or not taxable income or deductible loss resulted from these transactions are now before the Bureau of Internal Revenue in great volume, and it is respectfully urged that the question here presented to the Court is of utmost importance to a great number of citizens and taxpayers, as well as to The United States. The adjustment and settlement of great numbers of cases must await the final determination of this question.

Also, depending upon this question, is the question o basis for determining gain or loss, depreciation and depletion of assets, acquired by a corporation in such a transaction, in all subsequent years.

There are many cases now pending in the courts and before the Board of Tax Appeals in which this question is a necessary issue. We believe that the question will ultimately have to be decided by this court. The present interpretation by the Circuit Court of Appeals for the

Fifth Circuit is contrary to every interpretation of the section heretofore made by any administrative body or tribunal. It was assumed by both Petitioner and Respondent that the facts in this case constituted a reorganization, and neither side argued it in the original briefs. The question was referred to by the court in oral argument and there was some little discussion of it but it was assumed that the question was not serious. It is respectfully suggested that the court's decision on this question was without careful consideration.

The Board of Tax Appeals proceeded upon the theory of a reorganization but based its decision upon a distinction between a sale and an exchange. This distinction, however, cannot properly be made. Congress, itself, has completely disposed of such a distinction through its own interpretation. See Report of Ways and Means Committee on Revenue Act of 1924 (Report No. 179, 68th Congress), Report of Finance Committee of the Senate (Report No. 398, 68th Congress) and "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor", prepared by the Treasury Department and printed for use of Senate Finance Committee, dated March 6, 1924, pursuant to which both committees and Congress adopted the section proposed. The Bureau of Internal Revenue, in its regulations, likewise construed the statute. Article 1574, Regulations 65; Article 1574, Regulations 69. Congress reenacted the same language after these interpretations.

In other words, the purpose of the legislation, the language itself, the interpretation by Congress and the interpretation by the Bureau were to the effect that when

substantially all of the assets of a corporation were disposed of for cash and securities, and the proceeds were distributed to the stockholders, there should be only one tax, and that a tax upon the stockholders, based upon the profit realized by them.

It is respectfully urged that unless the Court grants this writ, there will be a great injustice to Petitioner. We believe that this Court will ultimately hold that such a transaction constitutes a reorganization within the meaning of the Revenue Act of 1926. The Bureau of Internal Revenue has imposed a *double* tax on the transaction. Congress said there should be but one tax. If, therefore, the Court should ultimately hold that our interpretation of the statute is correct, the Commissioner of Internal Revenue will have exacted over $74,000 and interest from Petitioner, illegally and without warrant of law.

Wherefore, it is respectfully submitted that this petition should be granted.

Albert L. Hopkins

Jay C. Halls

Peter L. Wentz

Attorneys for Petitioner.

Hopkins, Sutter, Halls & DeWolfe,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals is reported in 57 Fed. (2d) 188, and is found at page 42, in the record.

The findings of fact and opinion of the Board of Tax Appeals are reported in 21 B. T. A. 425 and are found at pages 22 and 30, respectively, in the record.

Jurisdiction.

The order of the Circuit Court of Appeals affirming the decision of the Board of Tax Appeals was entered on March 29, 1932. (R. 34).

This Court has jurisdiction of this petition by virtue of Section 240 (a) of the Judicial Code, as amended. See also *Old Colony Trust Co.* v. *Commissioner of Internal Revenue,* 279 U. S. 716.

Question Involved.

The question involved is whether the acquisition of substantially all the assets of one corporation or in this case of two corporations by another without stock control of the transferee by the transferor constitutes a reorganization within the meaning of Section 203 of the Revenue Act of 1926.

Statute Involved.

The Revenue Act of 1926 provides in part:

"Sec. 203 (b) (3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * *

"(e) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, * * *

"(h) As used in this section and sections 201 and 204—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stock-

holders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization * * *."

(The Appendix contains Section 203 in its entirety.)

Statement.

A statement of the facts, errors relied on and reasons for granting the Petition for writ of certiorari will be found in the Petition.

ARGUMENT.

The Circuit Court of Appeals erroneously held that the acquisition of substantially all of the assets of one corporation by another is not a reorganization.

Whether gain or loss is recognized on a transaction may depend upon a number of questions, as well as on the question of whether the transaction was a reorganization. In this case the Circuit Court of Appeals made its decision solely on the ground that the transaction involved was not a reorganization. After stating its view regarding the existence of a reorganization, the court said:

> "It is unnecessary to pass upon petitioner's other contentions."

The Court of Appeals set forth its view of what constitutes a reorganization in the following language:

> "As applied to corporations the terms 'merger' and 'consolidation' have well known legal meanings. While the result is practically the same in either event, there is this difference. In a merger one corporation absorbs the other and remains in existence while the other is dissolved. In a consolidation a new corporation is created and the consolidating corporations are extinguished. In either event the resulting corporation acquires all the property, rights and franchises of the dissolved corporations and their stockholders become its stockholders. *Royal Palm Soap Co.* v. *Seaboard Air Line Ry. Co.*, 296 Fed. 448; *Bouvier's Law Dictionary,* (3rd Ed.) p. 2202, *verbo* 'merger'.

> "It must be assumed that in adopting paragraph (h) Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (b) of the paragraph removes any doubt as to the intention of Congress on this point."

We think it clear from the foregoing that the Court of Appeals decided the question without regard to the definition of the term "reorganization" in the statute, itself. The definition of "reorganization" by the Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the legislative history of Section 203 of the Revenvue Act of 1926, the Treasury regulations, the rulings of the Commissioner of Internal Revenue, the decisions of the Board of Tax Appeals, and the case of *Williams* v. *Commissioner,* 44 Fed. (2d) 467, decided by the Circuit Court of Appeals for the Eighth Circuit.

The language of statutory definition of "reorganization" expressly includes a case of the simple acquisition of all the assets of one corporation by another without any acquisition of stock control by the transferor or its stockholders.

Section 203 (h) provides:

> "As used in this section and sections 201 and 204—
> (1), the term 'reorganization' means (a) a merger or consolidation (including the acquisition by one corporation of * * * substantially all the properties of another corporation), * * *."

The wording of the statute permits no resort to extraneous definitions of reorganization as was done by the Circuit Court of Appeals in this case. Where a statute defines its terms, such definitions are controlling. "Reorganization" has been variously defined for different purposes. There have been a number of different statutory definitions. The term strongly needed definement in Section 203 and Congress did define it. That definition may not be disregarded.

The legislative history of Section 203 discloses that the definition applied by the Circuit Court of Appeals in this case nullifies the intent and defeats the purpose of Congress to eliminate double taxation in cases where a corporation disposes of substantially all its properties and distributes the proceeds to its stockholders. The statute is designed to avoid a tax on both the dissolving corporation, which serves merely as a conduit, and on its stockholders. Eliminating double taxation was further designed to remove what was otherwise a deterrent to normal business reorganization. The Circuit Court of Appeals in this case must have been oblivious of the meaning and purpose expressed in Section 203.

Prior to the Revenue Act of 1921, if a corporation transferred assets to another corporation and distributed the securities received to its stockholders, a taxable transaction resulted, both to the corporation and to the stockholders. It was recognized that this resulted in hardships upon taxpayers and hampered entirely proper and desirable business reorganizations. Consequently, the 1921 Act provided in Section 202 that in any corporate reorganization no gain or loss should result from the exchange of securities. The provisions of the 1921 Act, however, were still found to be too severe and, accordingly, section 203

of the Revenue Act of 1924 further liberalized the provisions of the 1921 Act. In the "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor", prepared by the Treasury Department for the use of the Committee on Finance of the United States Senate, it is said:

> "Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, *it is even more necessary to exempt from tax the gain realized by the corporation.*" (Italics supplied.)

And further:

> "A corporation in connection with a reorganization may dispose of its assets in one of three ways: It may transfer them to a new corporation in exchange for stock *or* cash; it may transfer them to the new corporation, the consideration being the payment by the new corporation of stock *or* cash to the stockholders of the old corporation; or the new corporation may buy, with its stock and cash, from the stockholders of the old corporation, their stock, and then liquidate the old corporation. If a corporation adopts the first method, its gain from the sale could be taxed. If it adopts the second method, the gain probably could be taxed on the theory of constructive receipt by the selling corporation. If it adopts the third method, there is no theory on which any gain to the old corporation could be taxed. *As a result of these considerations, subdivision (e) has been so drafted that the tax liability on the selling corporation is the same no mat-*

ter which of the three methods set out above is adopted. In other words, *if the selling corporation is a mere conduit* through which the consideration for the sale of the assets passes, or if the consideration for the sale of the assets is paid direct to the stockholders of the old corporation, without passing through the conduit, no gain or loss to the old corporation is recognized, *and the same result is reached that would have to be reached necessarily if the transaction were accomplished through the medium of a purchase by the new corporation of the stock of the old corporation, followed by a liquidation of the old.*" (Italics supplied.)

The intention of Congress is further evidenced by the language contained in the Report of the Committee on Ways and Means in recommending the passage of the Bill. The Committee said, in referring to Section 203(e) of the 1924 Act:

> "The subdivision provides that if a corporation in connection with a reorganization transfers its assets to another corporation, a party to the reorganization, for stock and securities of the same corporation and cash, then no gain or loss to the transferor is recognized, if it distributes the cash to its stockholders. But if the *selling* corporation fails to distribute the cash to its stockholders, then the gain or loss is to be recognized. *In other words, if the corporation which sells its assets in connection with the reorganization acts merely as a conduit in passing the proceeds of the sale on to its stockholders, no gain to the corporation is to be recognized,* but if it retains all or any of the proceeds with the result that the transaction is in substance a real sale, then all or a part of the gain shall be recognized." (Italics supplied.)

The Report of the Finance Committee of the Senate contained identical language to that contained in the Report of the Ways and Means Committee of the House of Representatives.

As hereinbefore stated, the provisions of the Revenue Act of 1926 and of the Act of 1928 in this connection are substantially identical with those of the Revenue Act of 1924.

From the foregoing, it clearly appears that Section 203(c) was intended to protect against double taxation of corporation and stockholder where, as part of the reorganization, the corporation disposes of its assets, distributes the proceeds and goes out of business. Under such circumstances, the stockholders are taxable but the corporation acts as a mere conduit and it was the intention of Congress that no tax be imposed upon the corporation. In this case the stockholders of the Pinellas Ice & Cold Storage Company, the petitioner, were subject to tax upon the proceeds distributed to them. Under the Statute there was no tax against the corporation upon the same proceeds.

Certainly the construction given the statute by the branches of the government charged with its enforcement is entitled to great weight. The Regulations of the Treasury Department recognize that under the statute the simple acquisition of substantially all the assets of one corporation by another is a "reorganization". This provision of the Revenue Act of 1924 is identical with that in the Revenue Act of 1926. Article 1574 of Regulations 65 under the Revenue Act of 1924 reads in part as follows:

> "If two or more corporations reorganize, for example, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2)

the sale of its properties by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all the properties of B, or (7) the transfer by A of all or part of its assets to B, where immediately after the transfer A or its shareholders are in control of B, * * *",

then no gain or loss to the corporation is recognized.

Further:

"Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See art. 1575.)

The first two examples of reorganizations under the statute set forth in the foregoing regulations have nothing whatever to do with stock control by the transferor or its stockholders. The acquisition of substantially all of the assets of a corporation alone constitutes a statutory reorganization. It makes no difference whatever whether the transaction comes within what the Circuit Court of Appeals referred to as "ordinary" definitions.

Article 1574 of Regulations 69 under the Revenue Act of 1926 reads in part as follows:

"If two or more corporations reorganize, for example, by—

"(1) the dissolution of corporation B and the sale of its assets to Corporation A,

"(2) the sale of its property by B to A,

"(3) the sale of the stock of B to A,

"(4) the merger of B into A,

"(5) the consolidation of A and B,

"(6) the acquistion by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all the properties of B, or

"(7) the transfer by A of all or part of its assets to B, where immediately after the transfer A or its shareholders are in control of B, * * *",

then no gain or loss to the corporation is recognized.

The Commissioner of Internal Revenue has repeatedly ruled that the simple acquisition of substantially all the property of one corporation by another is a reorganization under this provision of the statute. G. C. M. 3827, VII-2, C. B., Page 114, 1928. G. C. M. 7472, IX-1, C. B., Page 184, 1930. I. T. 2542, IX-2, C. B. 126, 1930. G. C. M. 8565, IX-2, C. B., Page 127, 1930.

There was corporate stock involved in some of these rulings, in one case, some preferred stock and no common, but in no case, is there any suggestion of control or of any particular percentage of stock. The General Counsel and the Bureau held in each case that there was a reorganization by reason of the acquisition of substantially all of the assets of a corporation.

In *G. C. M. 3827*, it was said (p. 115):

"It is noted that the O Company acquired all of the properties of the taxpayer company, and hence the transaction was a 'reorganization' within the express terms of the definition contained in section 203 (h) (1) * * *"

In *G. C. M. 7472*, it was said (p. 188):

> "It is clear that the transfer on ....., 1926, by the M Company of all its assets to the N Company, constituted 'the acquisition by one corporation of * * * substantially all the properties of another corporation' and hence a 'reorganization' within the meaning of section 203 (h)(1)(A) of the Revenue Act of 1926."

In *I. T. 2542*, it was said (p. 127):

> "In carrying out such plan, the M Company acquired the 10 Y shares of stock of the N Company, which constituted substantially all the assets of the old company. This transaction was a corporate reorganization within the meaning of section 112 (i) of the Act * * *" (Revenue Act of 1928).

In *G. C. M. 8565*, the General Counsel quoted from a discussion in the Senate in connection with the adoption of the Revenue Act of 1921, where, in discussing the following language:

> "A majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all of the properties of another corporation * * *"

Senator Simmons said:

> "That is in the disjunctive, 'or of substantially all of the properties'."

The decisions of the Board of Tax Appeals are practically to the same effect as the above opinions of the General Counsel. Wherever there has been an acquisition of substantially all of the assets of a corporation, the Board has held that there was a reorganization. In some of these

cases, stock was acquired and distributed to the stockholders but there is no requirement of controlling stock or of any percentage. In one case it was only preferred stock. *National Pipe & Foundry Co.* v. *Commissioner*, 19 B. T. A. 242. In this case the Board said (p. 250):

> "Under the definition of a reorganization as contained in paragraph 203 (h)(1)(A), the acquisition of substantially all the property of one corporation by another is a reorganization * * *.
>
> "* * * Under the 1926 Act, the statute specifically states that a reorganization shall include the acquisition of substantially all the assets of another corporation. Definitions of a reorganization or what a reorganization might be in the absence of the definition in the statute do not have the effect of changing what the statute specifically provides shall be included in a reorganization."

This decision was acquiesced in by the Commissioner of Internal Revenue but later the acquiescence was revoked because of the "failure of the Board's decision to limit the word 'distribute' to the cash distributions made to the stockholders."

In *Green* v. *Commissioner*, 24 B. T. A. 719, the Board at page 725 quoted the following language from G. C. M. 1753 (C. B. VI-1, p. 138),

> "For example, a transfer of *all* of the assets of a corporation constitutes a reorganization under the second part of definition (A) irrespective of the element of eighty per cent control demanded by definition (B)."

See also *Tulsa Oxygen Co.* v. *Commissioner*, 18 B. T. A. 1283.

The Circuit Court of Appeals for the Fifth Circuit in the case at bar decided that there is no merger or consolidation or statutory reorganization unless the stockholders of the merged or consolidating corporations become the stockholders in the resulting corporation. The statute speaks of "stock or securities" in the disjunctive throughout. Stock is not necessary. *Williams* v. *Commissioner*, 44 Fed. (2d) 467, decided by the Circuit Court of Appeals for the Eighth Circuit on October 10, 1930 is squarely contrary to the decision below. That case was under the Revenue Act of 1926. It appeared that the new Alberni-Pacific Company purchased all the stock of the old Alberni-Pacific Company in consideration of bonds and cash of the new company. The properties of the old company were transferred to the new company. Neither the old corporation nor its stockholders received any stock in the new corporation. In spite of the fact that neither the old corporation nor its stockholders held any stock interest in the new corporation, the Circuit Court of Appeals for the Eighth Circuit held that there was a reorganization on which neither gain nor loss would be recognized under the Revenue Act of 1926. We respectfully submit that the construction of the statute made by the Circuit Court of Appeals for the Eighth Circuit is correct and that the construction adopted by the Circuit Court of Appeals for the Fifth Circuit in this case is erroneous and ought to be corrected.

As well as being a reorganization, the transaction in other respects was a non-taxable transaction.

There was an exchange of substantially all of Petitioner's assets for cash and securities, as provided in section 203 (c)(1) of the Revenue Act of 1926. Promissory notes, secured by mortgage bonds, are securities. *G. C. M. 2000*, C. B. VI-2, page 248 at 250, *First National Bank* v. *United States*, 283 U. S. 142, *G. C. M. 3291*, C. B. VII-1, page 203.

The proceeds of the transfer were distributed to the stockholders in pursuance of the plan of reorganization. The Board of Tax Appeals found as a fact that there was a plan to convey the properties, dissolve the corporations and distribute the proceeds to the stockholders, all of which was carried out. (R. 30). It is true that some of the cash was used to pay debts of Petitioner. Distribution could not have been made without paying such debts. As a matter of fact, most of that part of the proceeds used to pay Petitioner's debts was never actually received by Petitioner but was paid directly to the creditors by the transferee. The transaction was fundamentally the same as if Petitioner's assets had been transferred subject to its liabilities. In legal effect there was no difference.

The Board of Tax Appeals decided against Petitioner because it said the transaction in question was a *sale* as distinguished from an *exchange*, and that only exchanges, as it defined them, were free from the double taxation. The Board was clearly in error.

The express purpose of Congress in this legislation was to relieve from double taxation where there was a transfer of substantially all of the assets of a corporation, a dis-

solution of the corporation and a distribution of the assets to the stockholders. The manner in which the assets are transferred is wholly immaterial, both as a matter of common sense, the reason for the legislation being the same in either event, and in the interpretation by Congress and by the Bureau of Internal Revenue. The Committees of Congress, in considering the legislation, and the Treasury Department, in proposing the legislation, and the Treasury Department in construing and administering the Act, have made no distinction between sale and exchange. In fact, the words have been used practically interchangeably. In the "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor," hereinabove quoted at page 15, the expressions "selling corporation," "consideration for sale" and "purchase by the new corporation," are used to explain what are non-taxable transactions under Section 203 of the Revenue Act of 1924, which is identical with Section 203 of the Revenue Act of 1926. The report of the Committee on Ways and Means, hereinbefore quoted at page 16, in explaining what transactions are non-taxable, used the expressions, "selling corporation," and "proceeds of the sale." As stated, the report of the Committee on Finance of the Senate contained identical language to that in the report of the Ways and Means Committee.

Article 1574 of Regulations 65, under the Revenue Act of 1924, hereinabove quoted at page 17, and Article 1574 of Regulations 69, under the Revenue Act of 1926, hereinbefore quoted at page 18, in discussing section 203 of the two statutes, repeatedly uses the word "sale" in describing non-taxable transactions. Regulations 65 was approved October 6, 1924 and Regulations 69 on August 28, 1926.

The Board of Tax Appeals, in deciding cases under Section 202 (b) of the Revenue Act of 1918 and Section 202 (c) of the Revenue Act of 1921, in each of which the word "exchange" was used (not "sale"), held in a number of cases that the transfer of property for cash and notes constituted an exchange within the meaning of those two statutes. In *Appeal of Somers Lumber Company*, 2 B. T. A. 196, where cash and a second mortgage were received in exchange for the property, the transaction was held to be taxable under section 202 (b) of the Revenue Act of 1918, which provides that:

> "When property is exchanged for other property, the property received in exchange shall, for the purpose of determining gain or loss, be treated as the equivalent of cash to the amount of its fair market value, if any, * * *"

In *Appeal of J. S. Cullinan*, 5 B. T. A. 996, the transferor received cash and vendors' lien notes and the Board held him taxable under section 202 (b) of the Revenue Act of 1918. In *Appeal of Anton M. Meyer*, 3 B. T. A. 1329, the transferor received cash and notes and it was held that he came within section 202 (c) of the Revenue Act of 1921, which provides for the exchange of property. In *Foster* v. *Commissioner*, 19 B. T. A. 958, cash and unsecured promissory notes were held to be an exchange under the Revenue Act of 1918. See also *Rusk* v. *Commissioner*, 20 B. T. A. 138, *Parris* v. *Commissioner*, 20 B. T. A. 320, *Appeal of Rodenbaugh*, 1 B. T. A. 477, affirmed in 25 Fed. (2d) 13. The Court of Appeals said in its opinion, page 15:

> "A statute must be read in the light of its purpose. *Tucker* v. *Alexander*, 275 U. S. 228. As it is

clear that the Congress intended completely to avoid the inequity of double taxation, we shall, in order to effectuate its intention, give the statute a construction as broad as the intention itself."

See also *National Pipe & Foundry Company* v. *Commissioner*, 19 B. T. A. 242, in which the Board of Tax Appeals held that a transaction in all respects similar to the one at bar was a non-taxable reorganization. As stated, this decision was acquiesced in by the Commissioner of Internal Revenue, which acquiescence was subsequently withdrawn because of certain language which has no bearing upon the present issue.

The interpretation of the Committees of Congress was necessarily prior to the enactment of the legislation. Regulations 65, under the Revenue Act of 1924, were promulgated prior to the enactment of the Revenue Act of 1926. Regulations 69 were promulgated prior to the enactment of the Revenue Act of 1928. Many of the rulings by the Bureau and decisions by the Board of Tax Appeals were prior to the re-enactment of the same provisions in subsequent statutes. The re-enactment of the legislation by Congress in the light of such interpretation should be held an adoption by Congress of that interpretation. *Komada* v. *United States*, 215 U. S. 392; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, *Commonwealth Commercial State Bank* v. *Lucas*, 41 Fed. (2d) 111, in which the leading cases are cited and discussed.

CONCLUSION.

It is respectfully submitted that the opinion of the United States Circuit Court of Appeals for the Fifth Circuit is grossly erroneous, and is in conflict with other rulings and decisions; that in all other respects not covered by the opinion by the Circuit Court of Appeals the transaction involved was non-taxable; and that the petition for writ of certiorari should be granted.

Respectfully submitted,

ALBERT L. HOPKINS,
JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.
1 No. LaSalle Street,
Chicago, Ill.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

CONCLUSION

APPENDIX.

Section 203 of the Revenue Act of 1926:

RECOGNITION OF GAIN OR LOSS FROM SALES AND EXCHANGES

Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(5) If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

(c) If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(c) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall

be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

(f) If an exchange would be within the provisions of paragraph (1), (2), (3), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(g) The distribution, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, of its stock or securities or stock or securities in a corporation a party to the reorganization, shall not be considered a distribution of earnings or profits within the meaning of subdivision (b) of section 201 for the purpose of determining the taxability of subsequent distributions by the corporation.

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(i) As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.